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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above causes on July 30, 1940, affirming the judgments of the United States District Court for the District of Minnesota.

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 188–198) is reported in 113 F. 2d 919. The district court did not write an opinion.

JURISDICTION

The judgments of the circuit court of appeals sought to be reviewed were entered on July 30, 1940 (R. 198–199). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States, when it raises the water in a navigable stream above the ordinary high-water mark for the improvement of navigation, is required to pay compensation for damages thereby caused to structures in the bed of the river.

STATEMENT

During the past thirty years Congress has appropriated large sums of money for the construction of a series of locks and dams in the upper Mississippi River. These dams, now 26 in number, raise the level of the river by creating slack water pools which are so spaced as to provide a nine-foot channel from Minneapolis to the mouth of the Missouri River. Lock and Dam No. 5, near Minneiska, Minnesota, was authorized by the Rivers and Harbors Act of July 3, 1930, c. 847, 46 Stat. 927, and is an integral part of the Government's program for improving the navigability of the upper Mississippi River. This dam raises the level of the river some six or eight feet above ordinary high-water mark (R. 133), creating a lake or pool which extends upstream for a distance of more than seven

miles and inundates the bottom lands along the west bank of the river in Wabasha and Winona counties, Minnesota (R. 156, 179).

The tracks of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the telegraph lines of the Western Union Telegraph and Cable Company are located on an embankment which follows the west bank of the Mississippi River across these bottom lands in Wabasha and Winona counties. Accordingly, the Government in 1933, before the dam was completed, instituted the present condemnation proceedings to acquire the right to back water across the companies' right-of-way and up against their embankment to an elevation of 660 feet above mean sea level (R. 1–7, 8–14, 15, 16). The court on August 4, 1934, entered an order granting the United States immediate possession (R. 23–24, 25–26). The Government then proceeded to remove the timber and underbrush in the margins of the river and in the area to be flooded, so as to prevent any subsequent clogging of the locks and spillways (R. 98, 107). The railroad embankment was thereby exposed to greater wind, wave, and ice action, which made it necessary for the defendants to riprap and otherwise protect their embankment (R. 116).

When the question of valuation was submitted to a jury in 1935, the Government offered to prove that the railroad company, in realigning and doubletracking its roadbed in 1910, had eliminated

a number of curves by placing portions of their embankment across the bends in the Mississippi River with the result that four segments of the present embankment (for a total distance of 5,300 feet) encroach upon the bed of the river.[1] This proof was offered on the theory that private rights in the beds of navigable streams are subordinate to the navigation servitude held by the Federal Government and that the defendants were therefore not entitled to compensation for the partial flooding of those four segments of their right-of-way and embankment which are located in the bed of the stream between high- and low-water mark (R. 127–129, 130–139, 140–147).[2] Diagrams illustrative of the physical facts involved in the Government's offer of proof are printed as an appendix, *infra*, p. 14.

The defendants objected to this evidence as immaterial (R. 130). They argued that structures located in the bed of the stream had to be compensated for in those cases where the damages complained of were caused by raising the level of the

[1] Before realigning their roadbed in 1910, the railroad company obtained the local Army Engineer's consent (R. 147–151), but the company did not submit its plans to the Chief of Engineers and the Secretary of War, as required by the Act of March 3, 1899, c. 425, sec. 9, 30 Stat. 1151.

[2] Appellees have conceded that one segment (1,200 feet) of the embankment rests on lands which are a part of the bed of the Mississippi River (R. 123). Whether the other three segments are within the bed of the river is a jury question (R. 191).

river over and above the ordinary high-water mark, and where the structures themselves were not a menace to navigation. The trial judge adopted this theory and rejected the Government's offer of proof (R. 147). The United States then moved to dismiss from the proceedings the four areas specified in its offer of proof, but this motion was also denied (R. 152–155).[3] A general verdict assessing the entire damages to the encroachment and non-encroachment portions of the embankment at $177,594.63 (R. 41) was approved by the court (R. 45–49).

The parties subsequently stipulated that the judgment should be subdivided, that $67,604.88 should be deemed the fair and reasonable cost of adjusting the structures in the four encroachment areas, and that the issues on appeal should be limited to the denial of the foregoing offer of proof and motion to dismiss (R. 118–125, 80–83, 84–87).

In an opinion rendered by the circuit court of appeals on July 30, 1940, the rulings of the district court on the questions thus reserved were affirmed. The appellate court held that the flooding of appellees' property above ordinary high water mark was a compensable taking even though the damaged structures were located in the bed of the stream (R. 138–198).

[3] In the condemnation petitions the Government expressly declared that the inclusion of property below high-water mark was not to be deemed an admission that defendant's title was superior to the public servitude (R. 4, 11).

SPECIFICATION OF ERROR TO BE URGED

The circuit court of appeals erred in holding that the United States, when it raises the water in a navigable stream above the ordinary high water mark for the improvement of navigation, is required to pay compensation for damages thereby caused to structures in the bed of the river.

REASONS FOR GRANTING THE WRIT

1. The navigable rivers of the United States are "the public property of the nation," and any private rights in these streams are subservient to the dominant power of Congress to improve navigation. *Gilman* v. *Philadelphia,* 3 Wall. 713, 724–725; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62, 70; *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U. S. 82, 87–88; *Scranton* v. *Wheeler,* 179 U. S. 141, 163. Although under local law the fee title to the bed of the stream may be vested in the riparian proprietor,[4] such title "is always subject to the servitude in respect to navigation created in favor of the Federal government by the Constitution."

[4] Each state decides for itself whether a riparian proprietor's title to lands along a navigable river stops at the high-water mark, extends to low-water mark, or continues to the thread of the stream. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 60; *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56, 64; *Whitaker* v. *McBride*, 197 U. S. 510, 511–512. In Minnesota private titles extend to low-water mark, with title to the rest of the bed in the state. *Morrill* v. *St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 226, 228, 2 N. W. 842 (1879).

Gibson v. *United States,* 166 U. S. 269, 272; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 635; *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 259; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62–63.

When the United States, in order to improve navigation, appropriates a portion of the bed of a navigable stream for a pier, a lighthouse, a breakwater, or a dam, the private proprietor is completely ousted. But such a "taking" is not compensable under the Fifth Amendment, because the United States is merely exercising a servitude to which the land was already subject.[5] It is clear from the decisions that the entire bed of the stream, including lands between ordinary high- and low-water mark, is subject to the Federal Government's navigation servitude. *Willink* v. *United States,* 240 U. S. 572, 580; *United States* v. *Dern,* 289 U. S. 352, 354. "When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water." *Greenleaf Lumber Co.* v. *Garrison,*

[5] *Scranton* v. *Wheeler* 179 U. S. 141, 163; *South Carolina* v. *Georgia,* 93 U. S. 4, 11, 12; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62, 72; see also *Stockton* v. *Baltimore & N. Y. R. Co.,* 32 Fed. 9 (C. C. D. N. J. 1887), referred to with approval in *Scranton* v. *Wheeler, supra,* pp. 159–161; *Hawkins Point Light-House Case,* 39 Fed. 77, 83 (C. C. D. Md. 1889), referred to with approval in *United States* v. *Chandler-Dunbar Co., supra.*

237 U. S. 251, 263; *Scranton* v. *Wheeler*, 179 U. S. 141, 143, 144.[6]

It therefore follows that persons who place piers, wharves, docks, and other structures "in the shallow water of the shore" on land subject to a navigation servitude do so with the realization that "every such structure in the water of a navigable river is subordinate to the right of navigation, *and subject to the obligation to suffer the consequences of the improvement of navigation*" (italics supplied). *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 70. And this is true even though the use which they make of the river bed does not in and of itself impede navigation. *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 86–87.

The servitude continues even though "the natural condition of the stream" has been artificially changed. For example, in *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, the United States dredged a channel across shallow waters where none had previously existed, thus destroying valuable oyster beds. But since the private owner's rights in these shallow waters were subject (p. 88) "to the power of Congress to deepen the

[6] See also *Marret* v. *United States*, 82 C. Cls. 1, 13 (1936), certiorari denied, 299 U. S. 545; *United States* v. *Meyer*, 113 F. 2d 387, 398 (C. C. A. 7, 1940); *Barr* v. *Spalding*, 46 F. 2d 798, 800 (W. D. Ky. 1928); *W. A. Ross Constr. Co.* v. *Yearsley*, 103 F. 2d 589, 593 (C. C. A. 8, 1939), affirmed on another point, 309 U. S. 18; *Jenkins* v. *United States*, 60 C. Cls. 23, 28–29 (1925), affirmed, 273 U. S. 649.

water over such lands", he had to "suffer the consequences" of the dumping operations which also destroyed oyster beds on each side of the dredged channel. In *West Chicago Railroad* v. *Chicago,* 201 U. S. 506, a tunnel which had been previously constructed under the Chicago River was ordered removed so that the channel could be dredged to a depth of 21 feet. This Court held that the owners were not entitled to compensation. In *Union Bridge Co.* v. *United States,* 204 U. S. 364, 373, 388–389, 399–400, the Government, after placing a dam across the Ohio River and raising "the water in the Allegheny and Monongahela at their junction six feet above their normal depths", ordered the bridge which spanned the Allegheny River at that point to be altered or removed so that it would not impede navigation on this artificially raised waterway. Here again the injury was not compensable.[7]

United States v. *Cress,* 243 U. S. 316, relied on by the court below, is not in point because it involved land impressed with no navigation servitude, namely, land in the bed of a *nonnavigable* tributary and land above high-water mark. Cf. *Marret* v. *United States,* 82 C. Cls. 1, 14 (1936), certiorari denied, 299 U. S. 545. If any dicta in that case be construed as indicating that the Gov-

[7] See *South Carolina* v. *Georgia,* 93 U. S. 4; *Cubbins* v. *Mississippi River Com.,* 241 U. S. 351, 369; *Jackson* v. *United States,* 230 U. S. 1; *Gibson* v. *United States,* 166 U. S. 269.

ernment's servitude in a *navigable* river is "confined to the natural condition of the stream," it is overborne by the actual decisions, discussed above, permitting the Federal Government to make artificial improvements without incurring any liability for damages caused to structures or property located on, under, and over the bed of the stream.

United States v. *Lynah*, 188 U. S. 445, also relied on by the court below, is of doubtful authority on this point and should be reexamined. In that case a riparian proprietor, by means of an embankment along the Savannah River, had reclaimed lands between high- and low-water mark which he used for the growing of rice. The Government later constructed a dam which kept the river a foot or two above its former level at low tide. This made it impossible to drain the rice lands which in time became permanently flooded. By a five to three decision, this Court held that there had been a compensable "taking." If the case be construed as denying the existence of a servitude in that portion of the stream between high- and low-water mark,[8] it has been impliedly overruled by the later

[8] The majority opinion written by Mr. Justice Brewer seems to have viewed the Government's navigation servitude as nothing more than the power to utilize the bed of the stream by paying compensation therefor, a mere power of eminent domain (pp. 464–465, 471). Such a narrow construction of the Government's paramount rights in the beds of navigable streams has been repudiated by later decisions permitting the Government to appropriate such lands for

decisions already discussed. The doubtful authority of the *Lynah* case is emphasized by the fact that a subsequent case involving an adjacent rice plantation on the Savannah River, presenting identical facts, was affirmed only by an evenly divided court. *United States* v. *Heyward,* 250 U. S. 633.[9]

Even if the *Lynah* decision is still good law, it is clearly distinguishable from the present case on the same grounds adopted by Mr. Justice Brewer in distinguishing it from *Mills* v. *United States,* 46 Fed. 738 (S. D. Ga. 1891). The railroad embankment here in question is not completely submerged. It is still being used and will continue to be used by the fast trains between Chicago and the Twin Cities (R. 99, 107). The defendants, like Mills, were merely put to some expense in order that they might be able to continue using the bed of the stream. Such injuries are consequential in character and do not constitute a taking within the meaning of the Fifth Amendment. *United States* v. *Lynah,* 188 U. S. 445, 473–474; *Manigault* v.

navigation purposes without the payment of compensation. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Jenkins* v. *United States*, 60 C. Cls. 23, 28–29 (1925), affirmed, 273 U. S. 649; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251.

[9] That case had been twice argued in the Court of Claims and a different Chief Justice on each occasion had expressed his doubts about the correctness of the *Lynah* decision. *Heyward* v. *United States*, 46 C. Cls. 484, 501 (1911), 52 C. Cls. 87, 89 (1917).

Springs, 199 U. S. 473, 484–485; *Bedford* v. *United States,* 192 U. S. 217, 224.

2. *Hood* v. *United States,* 49 C. Cls. 669, 678–680 (1914),[10] is in direct conflict with the decision below. There the claimant had constructed a mill over the Monongahela River. The United States, in improving navigation, raised the river's surface above ordinary high-water level, thereby flooding the lower part of the mill as well as some land above the high-water mark. The Court of Claims allowed recovery for the submergence of the uplands along the river bank but not for the flooding of the mill building located within the river bed. It will be noted that the building in the *Hood* case, like the embankment in the instant case, was not an obstruction to navigation—at least it had not been ordered removed. Yet the owner was not entitled to any compensation for the flooding of the structure to a point well above the natural high-water mark.

3. The instant question is one which will constantly recur as the Government continues to construct large dams in aid of navigation. For example, the establishment of other slack-water pools in the Upper Mississippi River has already given rise to similar questions in connection with Pools 3, 5A, 6, 8, 9, 11, 12, 13, 14, and 22. In each of

[10] An examination of the records of the Court of Claims discloses that upon a new trial subsequently granted in this case the same opinion as that appearing at 49 C. Cls. was adopted.

these cases the question arises whether the Government is liable for damages caused to those segments of the railroad embankments which are located in the bed of the river below high-water mark. Three railroads have presented claims, other than those here involved, in excess of $165,000, exclusive of interest. There are similar encroachments in the beds of other navigable rivers in which dams have been authorized or are contemplated, for which compensation will be denied or awarded according as the decision in the *Hood* case or the decision below is to be followed.

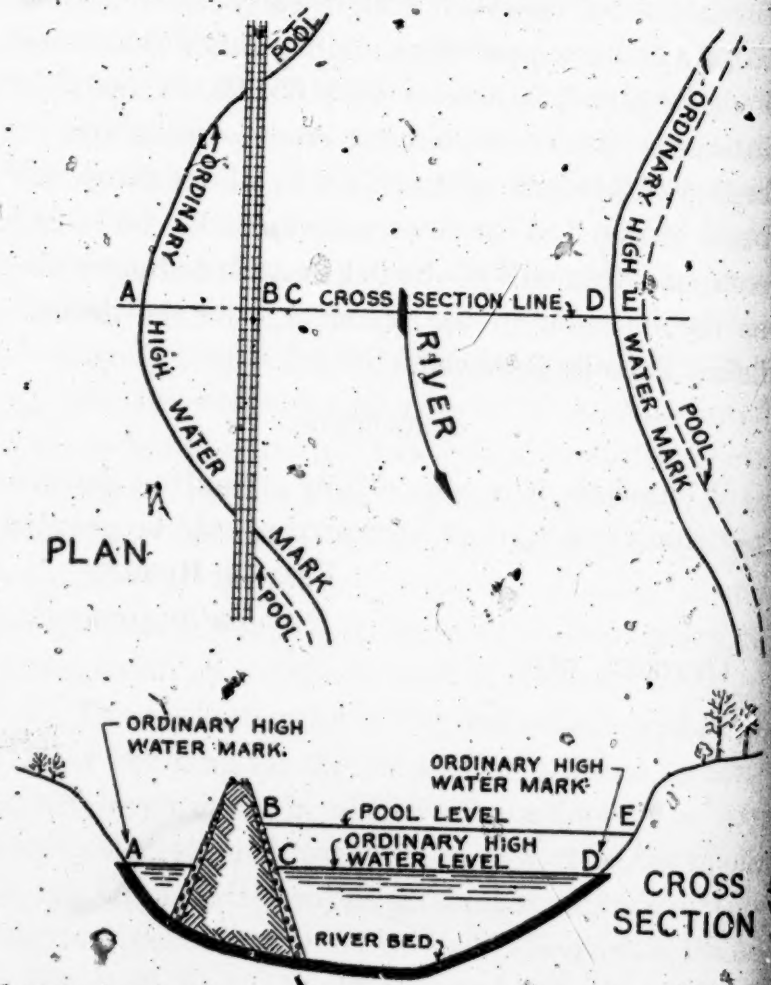
CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER, 1940.

APPENDIX



The above plan and cross-section are sketches of a typical "encroachment area." The Government concedes its liability to pay compensation for flowage of property situated outside of the river bed, as for example between D and E. But it denies liability to pay compensation for the flowage of property within the river bed caused by raising the water surface vertically above ordinary high water level, as from C to B.

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